

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: SYLVESTER MOSLEY, Petitioner v. UNITED STATES  
CASE NO: 97-7213 ct  
PLACE: Washington, D.C.  
DATE: Wednesday, October 14, 1998  
PAGES: 1-55

**REVISED**

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Supreme Court U.S.

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   SYLVESTER MOSLEY,                   :

4                   Petitioner                   :

5           v.                   :   No. 97-7213

6   UNITED STATES                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Wednesday, October 14, 1998

10           The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:05 a.m.

13   APPEARANCES:

14   DONALD J. McCAULEY, ESQ., Newark, New Jersey; on behalf of  
15   the Petitioner.

16   DAVID C. FREDERICK, ESQ., Assistant to the Solicitor  
17   General, Department of Justice, Washington, D.C.; on  
18   behalf of the Respondent.

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1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 97-7213, Sylvester Mosley v. The United  
5 States.

6 Mr. McCauley.

7 ORAL ARGUMENT OF DONALD J. McCAULEY

8 ON BEHALF OF THE PETITIONER

9 MR. McCAULEY: Mr. Chief Justice, and may it  
10 please the Court:

11 The issue in this case --

12 QUESTION: Just a moment, Mr. McCauley.

13 Spectators are admonished, do not talk until you  
14 get out of the courtroom. The Court remains in session.

15 Proceed, Mr. McCauley.

16 MR. McCAULEY: The issue in this case is, if  
17 this Court is to imply a mens rea element in the Federal  
18 bank robbery statute, as both sides concede it must, then  
19 the Court's decision in Morissette v. The United States  
20 governs.

21 In Morissette v. The United States, the Court  
22 held that it would imply a specific intent element into a  
23 statute that codified a common law crime.

24 QUESTION: There, the statute itself had no  
25 intent requirement, did it, in Morissette, statute by its



1 terms.

2 MR. McCAULEY: That's correct, although I  
3 believe there was mention of a knowingly in the Morissette  
4 case, a general intent, and this Court held that where the  
5 legislature, Congress was codifying a crime that was a  
6 crime at common law, it considered the whole tradition of  
7 the common law, wherein an evil intent had always been  
8 either a specific element of the statute of common law, or  
9 the understanding of the case law common law, so when the  
10 Congress was legislating against that common law backdrop,  
11 this Court held a statute that did not have the literal  
12 word intent, or evil will, that was not deleted by  
13 Congress through inadvertence, that the Court would  
14 require a specific statutory statement by the Congress  
15 saying that it intended and directing that its intention  
16 was contrary to the common law understanding that an evil  
17 intent was always there.

18 QUESTION: What we're talking about here, I  
19 guess the question presented is whether bank larceny is a  
20 lesser-included offense of bank robbery, is that right?

21 MR. McCAULEY: Yes.

22 QUESTION: And the reason that intent is  
23 important, and that's why you're talking about it, is  
24 what?

25 MR. McCAULEY: Is the larceny statute

1 specifically has an element, intent to steal, whereas the  
2 current codification of the bank robbery statute does not  
3 have the word intent. It has the steal language in that  
4 there's a phrase, to take from the person or presence of  
5 another, which is the definitional term for steal.

6 QUESTION: And if intent is read into it, then  
7 it -- bank larceny is a lesser-included offense, and if  
8 intent is not read into the robbery statute, then bank  
9 larceny is not a lesser-included offense?

10 MR. McCAULEY: Yes, Your Honor, under this  
11 Court's holding in Schmuck.

12 If it is read in, and we have the definitional  
13 phrase connoting steal, then it mirrors the elements that  
14 are at issue in the lesser offense, the intent to steal.

15 QUESTION: Well, even if that is so, don't you  
16 have a problem in this case, because the lesser-included  
17 offense that you ask the charge to be given on was the  
18 more serious of the two larceny offenses, i.e., theft of  
19 something more than 1,000, and there's no requirement of  
20 value of more than 1,000 in the robbery statute, so is it  
21 not -- I guess another way to put my question is, is it  
22 not the case that if you're right so far, the lesser of  
23 the two larceny statutes may be a lesser-included offense,  
24 but the one you asked for, which requires proof of more  
25 than 1,000, is not?

1 MR. McCAULEY: No, Justice Souter. The \$1,000  
2 threshold that's in the two paragraphs of the larceny  
3 statute is not a requisite element of larceny.

4 QUESTION: Well, why isn't it? It is, as you  
5 just said, in a separate paragraph. That's not usually  
6 the way sentencing elements are described.

7 MR. McCAULEY: I submit that the \$1,000  
8 threshold is to distinguish between a felony larceny,  
9 felony bank larceny --

10 QUESTION: Mm-hmm.

11 MR. McCAULEY: -- and a misdemeanor bank  
12 larceny.

13 Now, the crime of robbery is always a felony,  
14 and we were charged in the indictment with a crime of  
15 robbery, and the indictment set forth amounts more than  
16 \$1,000, \$9,000 in count 1 --

17 QUESTION: Yes, but the test is not whether this  
18 is lesser-included within the meaning of the indictment as  
19 it charged the crime in fact. It's -- the test is a  
20 reference to the statutory elements and, if that's the  
21 test, then an element of more than \$1,000, it seems to me,  
22 defeats your case.

23 MR. McCAULEY: That's why it is our position,  
24 and we urge the Court, that the \$1,000 mentioned in the  
25 two paragraphs of the larceny statute is not a requisite

1 element.

2 QUESTION: But if we take the position that it  
3 is a requisite element, that's the end of your case,  
4 right?

5 MR. McCAULEY: I don't believe so, because  
6 there's language in the robbery statute regarding monetary  
7 value.

8 QUESTION: Yes, but there's nothing about  
9 \$1,000. If I steal -- if I rob the bank teller of \$1,  
10 I've committed the robbery offense. I've not committed  
11 the \$1,000 larceny offense.

12 MR. McCAULEY: No. You would have committed the  
13 misdemeanor larceny offense.

14 QUESTION: I take it you think the \$1,000 is  
15 simply an amount that triggers different punishment  
16 levels.

17 MR. McCAULEY: Yes, and I think it's illustrated  
18 by the indictment requirement, the Fifth Amendment right  
19 to indictment, where any felony we're entitled to a right  
20 to an indictment, where you wouldn't be entitled to a  
21 right to an indictment on a misdemeanor larceny.

22 QUESTION: Well, you said in your brief that the  
23 model instructions for this crime also support your  
24 position, but those model instructions tell the jury first  
25 to find whether there's been larceny, and then if they do

1 find it, the jury finds whether there's been \$1,000 or  
2 more of value involved. It goes to the jury, doesn't it,  
3 under those model instructions that you cite?

4 MR. McCAULEY: Yes. If that is --

5 QUESTION: Well, why would it go to the jury if  
6 it's just a sentencing factor?

7 MR. McCAULEY: Only if that issue is being  
8 litigated.

9 QUESTION: Why would it go to the jury even if  
10 it's being litigated? Why wouldn't it be a matter for the  
11 judge?

12 MR. McCAULEY: If there were -- if there was  
13 evidence issues regarding the exact amount of the money  
14 the triggers --

15 QUESTION: When there's evidence issues on a  
16 sentencing factor, it goes to the jury?

17 MR. McCAULEY: No. If there were, under a  
18 particular scenario, evidence to support either --

19 QUESTION: Under those model instructions the  
20 question of \$1,000 goes to the jury I think because it's a  
21 separate crime.

22 QUESTION: The Third Circuit dealt with this  
23 question. What did they say about it? They dealt with  
24 the amount.

25 MR. McCAULEY: In a footnote, they said this is



1 not an element. They said it had -- it was not a  
2 requisite element, that common law, Congress did not when  
3 it legislated consider this a requisite element, when it  
4 took the common law terms and laid them out in what is a  
5 larceny.

6 QUESTION: Mr. McCauley, I know you didn't  
7 intend this, but when you set forth section 2113 on page 2  
8 of your brief I find it misleading.

9 It shows subsection (b) as containing only one  
10 paragraph, whereas in fact, as shown in the  
11 Government's -- the appendix to the Government's brief,  
12 page 2a of the appendix, subsection (b) contains two  
13 separate paragraphs, one of which is the \$1,000, and the  
14 other one is no value requirement at all, and I think that  
15 makes a big difference as to whether you consider this  
16 just a sentencing factor or a separate offense.

17 MR. McCAULEY: Oh, it is a critical difference.

18 QUESTION: Well then, why didn't you set forth  
19 the whole statute instead of just that one paragraph?

20 MR. McCAULEY: Well, we apologize if that -- we  
21 did not believe that that was at issue, that the Third  
22 Circuit, the court below dropped a footnote, said this is  
23 not an element, it's clearly a distinction between  
24 felonious -- a felony and a misdemeanor.

25 Our understanding of the case law was that

1 that's the reason for the \$1,000. The critical element  
2 that the court below was saying is missing from the  
3 robbery statute is this intent to steal, and the position  
4 is that that has always been in the robbery statute. The  
5 Government concedes it was a requisite element up until  
6 1948.

7 It's only with the recodification of title XVIII  
8 in 1948 that the word intent in the form of the term  
9 felonious is deleted, and that's explained by this Court  
10 in the Prince matter, that it was just a change in  
11 phraseology, and that --

12 QUESTION: Suppose the statute first said that  
13 robbery must be done with intent to steal and to take  
14 away, then 2 years later the Congress excises that phrase  
15 intent. What would we take Congress' purpose to be, just  
16 by comparing the two statutes?

17 MR. McCAULEY: Under the Court's holding in  
18 Morissette, and reaffirmed 4 years ago in Staples and  
19 X-Citement Video, you would require a specific statutory  
20 statement saying that we are acting contrary to the common  
21 law understandings of a common law crime.

22 QUESTION: In other words, you understand  
23 Morissette to say that Congress has to say, we are  
24 enacting the statute contrary to the common law and the  
25 foregoing paragraph is to be interpreted accordingly?

1 Does Congress have to say that?

2 MR. McCAULEY: Yes. That's my understanding in  
3 Morissette with respect to common law crimes, crimes that  
4 were malum in se at common law, not crimes that are malum  
5 prohibitum.

6 As the Morissette case says, if we were dealing  
7 with just regulatory offenses, it would not -- if this  
8 Court, under its holding in Morissette, would not require  
9 a specific contrary statement by Congress.

10 But the Court stated in the Morissette opinion  
11 absent a specific statement to the contrary we will imply  
12 this scienter requirement, this mens rea, this intent, and  
13 there -- and I think what's also illustrating --

14 QUESTION: Well, but Morissette didn't -- or  
15 maybe it did. Correct me if I'm wrong -- didn't involve  
16 the hypothetical that I put of a statute which is  
17 specific, and then a statute that's changed the next year,  
18 not as part of a recodification, just suppose that  
19 Congress changes the one specific statute. Morissette  
20 didn't involve that instance, did it?

21 MR. McCAULEY: Yes. Felonious had fallen out of  
22 section 641, the statute that was interpreted in  
23 Morissette, and the Court --

24 QUESTION: Felonious did. Felonious did, but  
25 what -- suppose the words were, with intent to steal.

1 Same rule?

2 MR. McCAULEY: Yes, the same rule, because the  
3 Court in Morissette said, anything, these critical  
4 elements, whether they be actus reus or mens reas, that  
5 had been established in the more important part of  
6 criminal jurisprudence, they are not changed --

7 QUESTION: Well --

8 MR. McCAULEY: -- by inadvertence.

9 QUESTION: Well, that was an -- that's an  
10 extraordinary position you're taking, that in -- the  
11 statute at one time says with intent to steal, and  
12 Congress passes a law saying, we repeal the requirement  
13 that there be an intent to steal, and you're saying in  
14 effect Congress can't do that.

15 MR. McCAULEY: No. No. Then that is a specific  
16 statement that the Court is looking for in the Morissette  
17 analysis.

18 QUESTION: So all you need, then, is an express  
19 repeal by Congress of an intent requirement that was  
20 formerly there.

21 MR. McCAULEY: Yes. That is my understanding of  
22 Morissette.

23 QUESTION: But you have that here. But you have  
24 that here. I mean --

25 MR. McCAULEY: No. The legislative history is

1     silent on that, and the legislative history --

2             QUESTION: I don't care about the legislative  
3     history. Feloniously was there, and feloniously was  
4     repealed.

5             MR. McCAULEY: And it was explained in the  
6     Prince case as a change in phraseology to tidy up the  
7     statutes.

8             QUESTION: Well, but then you have to answer the  
9     Chief Justice's question differently, and you have to  
10    appeal to legislative history instead of simply asking --  
11    answering his question that it -- that you accept the fact  
12    that if the word is there, and is then repealed by  
13    Congress, the common law requirement is eliminated,  
14    because that is the situation here.

15            MR. McCAULEY: I understand the Chief Justice's  
16    question to say if Congress says we're repealing that,  
17    that is a specific statement to the contrary --

18            QUESTION: Congress has to say it in addition to  
19    passing the statute that says it?

20            MR. McCAULEY: A specific indication that it is  
21    acting contrary to the common law --

22            QUESTION: You need legislative history to  
23    confirm what the statute says, or else the statute is  
24    ineffective to do that?

25            MR. McCAULEY: If you have it. If you don't



1 have legislative history, you look at the text, and you  
2 understand the text, and if it's a common law offense, the  
3 Court's -- under the Court's precedents an implied --  
4 specific intent will be implied in --

5 QUESTION: That's an equally extraordinary  
6 position, it seems to me.

7 You have a situation where the statute at one  
8 time says, with intent to steal, and then Congress passes  
9 a law that says, you know, enacted by Congress and so  
10 forth, that the words intent to steal are hereby deleted  
11 from the statute, and there are no committee reports, no  
12 legislative history.

13 Now, does that successfully get rid of the  
14 intent to steal requirement?

15 MR. McCAULEY: Yes. That's a specific statement  
16 by the Congress that it is deleting that element that has  
17 previously been there.

18 QUESTION: Well, it isn't a -- it's not a  
19 specific statement. It's a deletion, and that, I gather,  
20 is enough.

21 MR. McCAULEY: Yes, and it is changing. It is  
22 changing the requisite elements. Here, they're --

23 QUESTION: That is not the situation here  
24 because the legislative history, in your estimation, shows  
25 what?

1 MR. McCAULEY: That felonious was deleted as a  
2 matter of phraseology to tidy up the statutes in 1948 that  
3 had become cumbersome through the repeated use of the  
4 term, felony and misdemeanors.

5 QUESTION: We don't -- as I understand it, we  
6 wouldn't necessarily have to go to legislative history for  
7 that conclusion, would we, because I assume what we would  
8 find, if we went through the codification, is that two  
9 things happened.

10 They took out the word feloniously in all the  
11 statutes that used to have feloniously in it, and they  
12 simultaneously enacted a new definitional section which  
13 described as a matter of definition what a felony is and  
14 what a misdemeanor is, and I take it we could infer from  
15 that, without even getting to legislative history  
16 explanations, that what they were doing, as you said, was  
17 sort of tidying up.

18 They were taking out what they thought were  
19 merely useless words of classification, but nothing more.  
20 Is that fair to say?

21 MR. McCAULEY: Yes, and what they did not  
22 delete -- and in 1937, that was the first modification of  
23 the original bank robbery statute that was enacted in  
24 1934. The Prince case explains and the legislative  
25 history is not malleable on this.

1           The statement is, it's an act, the 1937 act is  
2   an act to include lesser-included offenses of robbery, and  
3   it was in response to the Justice Department writing to  
4   the Congress saying, they had an example where someone  
5   went into the bank and took the money, but there was no  
6   force, threat, or intimidation, and they couldn't be  
7   prosecuted under the robbery statute because of the  
8   robbery's requirement of that extra element of force,  
9   threat, or intimidation.

10           And the Congress responded and entitled the act,  
11   Bank Robbery and Incidental Crimes, and their statement in  
12   the legislative history specifically stated, this is an  
13   act to amend the bank robbery statute to include the  
14   lesser offenses of bank burglary and bank larceny.

15           QUESTION: They said the words, lesser offenses?

16           MR. McCAULEY: Yes.

17           QUESTION: Because it's one thing to say they  
18   filled a gap that the bank robbery statute left open, and  
19   another to say that the way they filled it was by creating  
20   a lesser-included offense.

21           MR. McCAULEY: Yes. I believe the statement,  
22   preface statement is, this is an act to amend the robbery  
23   statute to include the lesser offenses.

24           QUESTION: But Prince deals with the merger of  
25   offenses, doesn't it? It doesn't talk about the same

1     thing we're talking about here, lesser-included offenses.

2                 MR. McCAULEY: That's correct. The Prince case  
3     held that there couldn't be pyramiding of punishments. If  
4     the actual robbery is completed, and the person had been  
5     indicted for the completed robbery and also indicted for  
6     the unlawful entry with the intent, that the -- those  
7     elements would collapse in and there could only be one  
8     punishment. The Court struck down the consecutive  
9     sentences in Prince.

10                I cited the Prince case for the explanation of  
11    what -- how felonious does not appear in the current  
12    statute, where it always did appear in the original  
13    enactment and then in the amendment in 1937, because that  
14    is the critical term that is missing.

15                I think what's also illustrates this, and it's  
16    the Government's brief at page 11, when they recite what  
17    they say are the requisite elements of the bank robbery  
18    statute, they do not recite the language, to take from the  
19    person or presence of another. The definitional term of  
20    the word steal, it's there in the text.

21                The Government overlooks it in its recitation on  
22    page 11. It also overlooks it when it draws this Court's  
23    attention to other robbery statutes that the Congress has  
24    enacted on pages 14 through 15 of the Government's brief.

25                It deletes in their recitation -- and it's

1 included in the whole appendix, but not when they have it  
2 in the body of their brief, these -- the critical  
3 definitional term for steal, to take from the person or  
4 presence of another.

5 QUESTION: Then what you're saying is that the  
6 bank larceny statute is simply redundant. Both statutes  
7 use the word take, but the bank larceny statute goes on to  
8 say, and carry away with intent to steal, so I gather what  
9 you're telling me now is that the words, carry away with  
10 intent to steal, are surplusage, that all it takes is the  
11 word take.

12 MR. McCAULEY: They were used -- at common law  
13 the statutes had used the word take, and also carry away,  
14 as delineating various elements. It was a requirement of  
15 asportation, was the term that was used. There had to be  
16 some movement.

17 QUESTION: Would the bank larceny statute be any  
18 different, would it cover anything less, if it simply  
19 read, takes, and left out the words, carries away with  
20 intent to steal?

21 MR. McCAULEY: If the carries away was taken  
22 out, there wouldn't be this asportation, of the  
23 movement --

24 QUESTION: All right, with intent to steal. It  
25 just --



1 MR. McCAULEY: -- of the property with intent to  
2 steal.

3 QUESTION: If it just said take --

4 MR. McCAULEY: Yes, and I say the greater  
5 offense, robbery, also has this asportation requirement in  
6 the definition of steal, and take --

7 QUESTION: What if it says, takes and carries  
8 away, but does not say, with intent to steal or purloin?

9 MR. McCAULEY: Then it's not a larceny. That  
10 was a requisite element at common law.

11 QUESTION: And we wouldn't read that element in?

12 MR. McCAULEY: No, not that actus reis.

13 QUESTION: We would not read it in?

14 QUESTION: We wouldn't read it into the statute?

15 QUESTION: Gee. But you're asking us to do the  
16 same thing to (a).

17 MR. McCAULEY: I --

18 QUESTION: Why wouldn't we do the same thing to  
19 (b), if that phrase was not in (b)?

20 MR. McCAULEY: Because the evil intent was  
21 always a critical element, the means rea element, whereas  
22 whatever actus reis may have been required, but not --

23 QUESTION: Gee, I really don't understand your  
24 case, then, because I had thought that your case was, in  
25 describing common law crimes, Congress is often a little

1 sloppy, and sometimes they leave out a word like  
2 feloniously. It doesn't mean that it wasn't intended to  
3 be there. They just leave it out sometimes.

4 Now I ask you if they left it out in (b), would  
5 that make any difference, but you say, oh, no, (b), if  
6 they left it out they would change the crime. It would no  
7 longer be the crime of larceny.

8 Why can't they be elliptical in (b) just as you  
9 say they have been elliptical in (a)?

10 MR. McCAULEY: I don't understand -- if they  
11 take out the intent to steal element of larceny, my answer  
12 was that then it wasn't a larceny by definition in common  
13 law.

14 QUESTION: Now, I -- oh, maybe what you -- maybe  
15 the reason we're not -- I don't mean that they take it  
16 away with the intent of taking it away. They just delete  
17 it from the statute.

18 The next time the statute appears, they say,  
19 we've consolidated statutes, and there are too many words  
20 in these statutes. We're going to take away with intent  
21 to steal or purloin, okay, the same thing that you say  
22 happened under (a), that they just dropped feloniously  
23 because it was too verbose, or whatever.

24 Suppose they did the same in (b), and they  
25 dropped with intent to steal or purloin.

1           MR. McCAULEY: And they still labeled that bank  
2 larceny.

3           QUESTION: Yes. Then it would still be larceny,  
4 wouldn't it?

5           MR. McCAULEY: Absent a contrary expression that  
6 they were rewriting the common law, the Court could imply  
7 that requisite element.

8           QUESTION: I thought your position was that the  
9 word takes does it all, so why should the word takes be  
10 any different when you're talking about larceny than a  
11 robbery?

12           I thought you said that the whole thing that  
13 imports the idea of intent to steal is the word take. You  
14 said that about the bank robbery statute, and now you're  
15 saying something different, no, you need more in the bank  
16 larceny statute.

17           MR. McCAULEY: In the bank robbery statute, I'm  
18 relying on the Court's holding in Morissette and its  
19 prodigy to put that critical mens rea intent element in  
20 where felonious had been, and felonious had modified the  
21 definitional term of steal.

22           So up until 1948, we had intent to take from the  
23 person of another, intent to steal.

24           The element that the court below held as a  
25 matter of law does not appear in the robbery statute, and

1 because it doesn't appear, the robbery statute doesn't  
2 embrace, fully embrace the requisite elements of the  
3 larceny statute. So under Schmuck, as a matter of law,  
4 it's not a lesser-included offense.

5 I say, as a matter of law, intent is there  
6 implicitly, impliedly by the Court's precedents, and that  
7 when felonious was taken out, absent a specific  
8 congressional statement that they were doing that  
9 intentionally and not by inadvertence.

10 They were not looking to revolutionize the  
11 understanding of robberies and larcenies --

12 QUESTION: But there's another --

13 MR. McCAULEY: -- which they recodified in 1948.

14 QUESTION: Isn't there another problem, that the  
15 criminal intent can be one of two kinds? It can be a  
16 general intent to violate the law, which Morissette says  
17 we will always imply, or it can be more specific, an  
18 intent to deprive the person permanently of the property.  
19 You could have the former without having the latter.

20 MR. McCAULEY: Yes.

21 QUESTION: And I think one of the Government's  
22 argument is that, well, you have the former in (a) but not  
23 necessarily the latter, and what is your response to that?

24 MR. McCAULEY: Well, that essentially turns the  
25 reasoning of Morissette on its head, because Morissette

1 said, when we're dealing with statutory definitions or  
2 codification of common law offenses, we will imply this  
3 evil mens rea, specific intent. I believe that is the  
4 holding and the rationale in Morissette.

5 We would not do it, we would allow for a general  
6 intent in other offenses, public welfare offenses,  
7 regulatory offenses.

8 But where Congress legislates in the traditional  
9 common law area of crimes, absent a specific statement, it  
10 will be the specific intent that the Court would apply.

11 QUESTION: I don't understand these words,  
12 specific intent, et cetera, so in my own mind it comes  
13 down to just what Justice Stevens said, that the  
14 difference, whether there's a specific intent or not, from  
15 any practical point of view, is whether a person who goes  
16 into a bank, puts out a gun, takes the money, goes out of  
17 the bank, but he did it with an intent to return the  
18 money, you see.

19 (Laughter.)

20 QUESTION: Now, if, in fact, he still committed  
21 bank robbery, they win, but if, in fact, he hasn't  
22 committed bank robbery, you win. Isn't that what it comes  
23 down to?

24 MR. McCAULEY: Yes.

25 QUESTION: Yes, and if it comes down to that,



1 have you found any case, ever, in history, where there was  
2 such a person, where in fact he put the gun up -- I mean,  
3 we found one, almost, in the Sentencing Commission, where  
4 a person who took some money with a toy gun to pay his  
5 veterinarian and -- because he wanted the dog cured, and  
6 gave back the money when the dog died, I mean, but that  
7 was -- that was an unusual case, and I'm not sure it  
8 applies.

9 So I take it we're talking about very unusual  
10 cases. You've both done research. I will ask both sides  
11 the same question. Has any case that sheds any light on  
12 that particular question, rather than using these vague  
13 words, ever come up?

14 MR. McCAULEY: The intent, in any case --

15 QUESTION: I don't want to use words like  
16 intent. What I want to know is, has there ever been a  
17 case one way or the other where a person who did all these  
18 things for bank robbery, and he walked out the door, but  
19 he intended to give the money back. In that sense there's  
20 proof he was going to give the money back. He was just  
21 going to walk around the block with it and give it back,  
22 or the equivalent.

23 Now, that's what you say the case turns on, and  
24 I agree with you. Now, has there ever been such a case,  
25 or the equivalent?

1 MR. McCAULEY: There wouldn't be a reported case  
2 because I submit it's not a robbery, and he may not have  
3 been indicted.

4 QUESTION: No, no, there could be. The  
5 Government or the State could have prosecuted somebody for  
6 that as robbery, and the judge would have had to decide,  
7 yes or no, is it a robbery. That could have happened in  
8 the history of the 50 States, and common law and, I don't  
9 know, everything else, or statutes like this could have  
10 happened.

11 MR. McCAULEY: I'm not aware of a case that,  
12 Your Honor, Justice Breyer --

13 QUESTION: I think I recall a case in which  
14 somebody walked in and was under the impression that money  
15 that was in the hands of a teller belonged to him, rather  
16 than to the bank.

17 QUESTION: That's another instance.

18 QUESTION: And he snatched the money violently  
19 out of the hands of the teller, and said, give me that,  
20 that's mine, and without the feloniously portion of this  
21 statute, that would have been a crime. I don't remember  
22 where that case is.

23 QUESTION: Oh, no, but that's the other  
24 possibility. I didn't --

25 QUESTION: I don't know any such case, but it's

1 very possible for such a case to exist.

2 QUESTION: Didn't the Tenth Circuit in this case  
3 mention that as one possibility?

4 MR. McCAULEY: Yes.

5 QUESTION: In the Brittain case, the Tenth  
6 Circuit -- the Tenth Circuit gave two examples that seemed  
7 rather far out. One was, it was -- I thought it was my  
8 money that I was grabbing, and the other was, I really  
9 want to be put back in prison, so I actually intimidated  
10 the teller to give me the money, and I looked for the cops  
11 when I got out on the street so I could be caught and be  
12 put back in prison.

13 MR. McCAULEY: Well, Justice Ginsburg, with  
14 respect to the first hypothetical, that I really thought  
15 it was my money, that had been a defense at common law.  
16 Under claim of right, if a person was recovering their own  
17 money by force and violence, that could defend and defeat  
18 the mens rea, the evil intent.

19 However, Congress, in drafting this language,  
20 and the text of this statute, both the larceny provision  
21 and the robbery provision has the added language that  
22 takes away that defense of claim of right.

23 The added language is, the property or money in  
24 the care, custody, and control of the bank, so  
25 irrespective, the going in and saying, give me my money,

1 if it's done by force, threat, in the presence of a  
2 person, it's a completed robbery, if -- irrespective if  
3 it's your own money, because it's in the care, custody,  
4 and control.

5 So they broadened the common law --

6 QUESTION: I don't understand that. I don't  
7 understand why that, adding that it has to be in the care,  
8 custody, or control of the bank eliminates the requirement  
9 that you intend to steal, rather than intend to get your  
10 own money back, even though it is in the --

11 MR. McCAULEY: Oh, it doesn't. It doesn't. My  
12 point was that it took away -- that language takes away  
13 the common law defenses, but a defendant claiming right to  
14 the money, and therefore defeating the element of intent  
15 to steal, because --

16 QUESTION: No, I --

17 MR. McCAULEY: If the money is in the care of  
18 the bank --

19 QUESTION: No, it isn't really his money. He  
20 thought it was his money. He thought it was his money.

21 MR. McCAULEY: Then I would say that's a  
22 completed robbery.

23 QUESTION: I'd like to ask you, if I could,  
24 about section -- subsection (c), which is at page 2a of  
25 the petition in the Government's brief. The receiver of

1 stolen property is guilty only if it's been stolen -- only  
2 if there's been a larceny under (b).

3 MR. McCAULEY: Yes.

4 QUESTION: Not under (a).

5 MR. McCAULEY: Yes.

6 QUESTION: Which way does that cut? Does that  
7 distinction help you, or does it help the Government?

8 MR. McCAULEY: Well, this distinction, I believe  
9 it helps us both, because it illustrates --

10 QUESTION: That doesn't help me much, but --

11 (Laughter.)

12 MR. McCAULEY: This Court's opinion in Gaddis  
13 interprets this statute. This is a receiving stolen  
14 property, and in Gaddis it was similar to the Prince  
15 analogy of pyramiding and consecutive sentences, and I  
16 think a reading of the Gaddis opinion, which was issued  
17 prior to the Prince elements test, the Gaddis opinion I  
18 think is illustrative and instructive, because I believe  
19 the Court in Gaddis is assuming that 2113(b) is a lesser-  
20 included offense of 2113(a).

21 This enacted in (c) --

22 QUESTION: No, but on the other hand, it seems  
23 to me to help the Government in that the statute seems to  
24 envisage a situation in which property has not -- in which  
25 there has been a robbery, but property has not been



1 stolen, and that, it seems to me, helps the Government.

2 MR. McCAULEY: Well, why it's not a lesser-  
3 included offense, and I would submit it's not a lesser-  
4 included offense of the robbery, where I submit (b) is, is  
5 because there's an additional element and there's  
6 additional purpose behind the text, and it's to go at  
7 other individuals, a different class of individuals,  
8 receivers of property, and that's what the Gaddis opinion  
9 explains.

10 So that's an additional class of people, a  
11 different purpose behind the text, and a different  
12 element, whereas I submit all of the elements within the  
13 text --

14 QUESTION: Thank you, Mr. McCauley.

15 Mr. Frederick, we'll hear from you.

16 ORAL ARGUMENT OF DAVID C. FREDERICK

17 ON BEHALF OF THE RESPONDENT

18 MR. FREDERICK: Thank you, Mr. Chief Justice,  
19 and may it please the Court:

20 Bank larceny is not a lesser-included offense of  
21 bank robbery under the statutory elements test announced  
22 by this Court in Schmuck v. United States. The plain  
23 language of the statute --

24 QUESTION: Well, it might be if we read in the  
25 intent to steal requirement.

1 MR. FREDERICK: No, Justice O'Connor, that's not  
2 correct, because even if you were to read in an intent to  
3 steal element in the bank robbery offense, there are two  
4 other textual indicators that suggest strongly that  
5 Schmuck test has not been met.

6 QUESTION: Well, you say the take and carry, but  
7 robbery requires taking from, and that's close enough for  
8 Government work, as they --

9 (Laughter.)

10 MR. FREDERICK: Not this Government, Justice  
11 O'Connor.

12 (Laughter.)

13 MR. FREDERICK: Take had a distinct meaning both  
14 at common law and under this statute. It means to gain  
15 caption over. Carrying away is to move while supporting,  
16 and all of the commentators who have construed those terms  
17 say that carrying away is a distinct element, that one  
18 could gain caption over property in a bank, commit the  
19 robbery offense, but not carry that property away, and so  
20 we would submit that the omission of carried away is --  
21 is a significant omission for establishing the elements  
22 test.

23 I would first --

24 QUESTION: On that point, then, suppose the  
25 scenario is, somebody grabs \$10,000 from the bank, they

1 didn't use any force or intimidation, and they start  
2 walking away. They're stopped at the door by the guard,  
3 so they didn't get away from the bank. No bank larceny.

4 MR. FREDERICK: Well, that's correct in those  
5 common law jurisdictions that it construed carrying away  
6 to go beyond the curtilage of the particular edifice.

7 QUESTION: I'm asking about this statute. This  
8 bank larceny statute. I'm in the bank, I grab \$10,000,  
9 intending to make it my own, but I'm apprehended at the  
10 door before I cross the threshold, and get outside the  
11 bank.

12 MR. FREDERICK: We would prosecute that person,  
13 and we would argue that carrying away had been satisfied,  
14 because the place where the person had taken the money or  
15 gained caption over it very likely was where the teller  
16 is, and the person had --

17 QUESTION: So as soon as he takes one step, he's  
18 carrying it away.

19 MR. FREDERICK: It's a -- that's correct,  
20 Justice Scalia.

21 QUESTION: This is a finely crafted statute.  
22 You're guilty of that offense if you take a step, and  
23 you're not guilty of it if you don't take a step. It  
24 seems very strange.

25 MR. FREDERICK: Well, the commentators noted

1 that the asportation requirement was a minimal one.

2 Justice Ginsburg, in further response to your  
3 question, there are jurisdictions that would not have  
4 found larceny on those facts because the carrying away had  
5 to go beyond the edifice, and typically it was a house  
6 where the larceny was --

7 QUESTION: Yes, but here we just want to know if  
8 this particular statute is a lesser-included offense of  
9 the bank robbery, so you're telling me that the difference  
10 between the two is one step. You don't have to take any  
11 step in robbery as long as you used intimidation or force,  
12 but you do have to take one step --

13 MR. FREDERICK: You have to make a carrying-  
14 away movement, and the jury must find that after it has  
15 been put in the indictment and proved beyond a reasonable  
16 doubt by the Government.

17 In the same --

18 QUESTION: No, finish your answer.

19 MR. FREDERICK: No, I -- in the same way that  
20 the Government must plead in the indictment under larceny  
21 that the amount taken was above \$1,000 and the jury must  
22 find that. That is an element of the larceny offense and  
23 not an element of the bank robbery offense, and we know  
24 that --

25 QUESTION: Was it ever an element of the robbery

1 offense at common law?

2 MR. FREDERICK: No.

3 QUESTION: So therefore, even on your position,  
4 even before the word feloniously was eliminated that still  
5 was not an element, and there was never this identity.

6 MR. FREDERICK: The monetary requirement, or the  
7 feloniously requirement. I'm --

8 QUESTION: When feloniously was removed from the  
9 statute, assuming it did nothing more than have this  
10 tidying up, or classifying a function, it did not -- it  
11 would be easier, I guess, to go back to my original  
12 question.

13 Before feloniously was removed from the statute,  
14 the Federal robbery statute never required an asportation  
15 because in your view that was not a requirement of common  
16 law and would not have been read into it under the words  
17 feloniously or in any other way, is that correct?

18 MR. FREDERICK: Yes, but let me explain further,  
19 because the asportation requirement was a requirement of  
20 robbery at common law, and feloniously did not encompass  
21 the asportation requirement. They were distinct.

22 If you look at Blackstone, Blackstone says  
23 feloniously takes and carries away, using force in the  
24 person or presence of another.

25 QUESTION: Right.



1 MR. FREDERICK: So if I've understood the  
2 multiple parts of your question --

3 QUESTION: No, I -- you've answered my question.  
4 You have said, it was a requirement at common law, but it  
5 was not comprehended by the word feloniously. It had to  
6 be spelled out in the statute. It was never spelled out  
7 in this statute, and therefore the removal of feloniously  
8 has nothing to do with the requirement under the Federal  
9 statute.

10 MR. FREDERICK: Of carrying away, that's  
11 correct, Justice Souter.

12 QUESTION: But if you define an -- call an  
13 offense robbery, and you define it, and suppose you left  
14 out carry away, I thought under Morissette and our  
15 jurisprudence that we would assume that the traditional  
16 asportation requirement was not eliminated simply by the  
17 failure to recite it.

18 MR. FREDERICK: Well, I'm glad that you raised  
19 Morissette, because I think there is some confusion about  
20 what the Court addressed and what it held.

21 The Court in Morissette did not hold that when  
22 Congress has defined terms using non-common law words, and  
23 six of the eight elements of this bank robbery statute  
24 depart from the common law, Morissette did not say you  
25 read in common law requirements.

1 In fact, in Morissette, as the Court explains in  
2 footnote 28 of its opinion, in describing the drafting  
3 history of section 641, Congress used the word converts,  
4 which was a common law word, and the question before the  
5 Court was, what did Congress mean when it used the word  
6 converts?

7 It had not appeared in any of the predecessor  
8 sections of that statute, and so what the Court held was  
9 that in tort cases a conversion could occur by an  
10 unwitting action if there was some negligence or something  
11 in the interference with the property rights of the true  
12 owner.

13 So in reading -- but at common law the crime of  
14 conversion required an intent to steal, so what the Court  
15 held in Morissette was that because Congress had used the  
16 words, knowingly converts in a crime, that it must have  
17 meant to include the intent to steal, because otherwise  
18 innocent conduct would be subject to the criminal  
19 sanction.

20 QUESTION: Congress had not used any words other  
21 than knowingly convert.

22 MR. FREDERICK: Well, it used embezzlement and  
23 steal, but the Government's prosecuted theory --

24 QUESTION: Was based on the converts.

25 MR. FREDERICK: That's correct.

1 QUESTION: That footnote also says the 1948  
2 revision was not intended to create new crimes but to  
3 codify those then in existence. How would you describe  
4 what happened here in light of that statement?

5 MR. FREDERICK: What we know, Justice Kennedy,  
6 is that the word feloniously was removed from the statute.  
7 The reviser's notes don't explain why. The reviser just  
8 simply says that there were changes in phraseology, so we  
9 do not know what Congress was thinking when it omitted  
10 those words.

11 QUESTION: So we do not know whether it intended  
12 simply to recodify or, on the other hand, whether it  
13 intended to create new crimes with new definitions. We  
14 just don't know.

15 MR. FREDERICK: That's unfortunately correct,  
16 Justice Kennedy.

17 I would point out that 2 years before the --

18 QUESTION: Wasn't there a general statement that  
19 the whole revision was intended to be a mere codification?

20 MR. FREDERICK: Yes, but this Court in Wells  
21 held that an omission of a word that had appeared in prior  
22 versions was not going to be read back in, and materiality  
23 in Wells was an element of the offense.

24 QUESTION: Suppose, then, we said there are two  
25 choices. Choice 1 is that Congress, in putting the word

1 steal in the one and not in the other -- it ended up that  
2 way, didn't it? And robbery doesn't have the word intent  
3 to steal, larceny does.

4 MR. FREDERICK: That's correct.

5 QUESTION: One possibility is that's simply an  
6 oversight, or they assumed it would be read in, and the  
7 other possibility is no, Congress did it purposely,  
8 leaving out the words, intent to steal, or feloniously,  
9 because Congress wanted to be sure that the person in  
10 Justice Scalia's hypothetical who unfortunately is trying  
11 to steal his own money, or the person in my hypothetical  
12 who, in fact, takes it out the door, walks around the  
13 block and wants to give it back, that that's what Congress  
14 wanted to do. Congress wanted to punish those two people.

15 Now, those seem to be the only two hypotheses I  
16 can think of, and it's obvious from the way I've stated it  
17 that I find the second hypothesis totally fanciful, but  
18 perhaps -- I mean, there's never been such a case, there  
19 never will be such a case, so the notion that Congress  
20 wanted to punish those two cases which will never occur is  
21 fanciful.

22 The notion that it wanted to keep the same  
23 requirement, and had nothing more in mind than everybody  
24 read it in, is not fanciful, so what's your response to  
25 that?

1 MR. FREDERICK: 2 years before Congress codified  
2 the laws in 1948 --

3 QUESTION: Yes.

4 MR. FREDERICK: -- it enacted a definition of  
5 robbery in the Hobbs Act which did not contain an intent  
6 to steal, but which underscored the seriousness Congress  
7 attached to forceful takings of property in the presence  
8 or from the person of another, and it is clear, as Judge  
9 Coffin in the First Circuit said in the DeLeo case in 1970  
10 that the acts of robbery are so unambiguously dangerous as  
11 to make implicit the mental element underlying the  
12 offense.

13 Our position is that robbery and the way  
14 Congress has defined it go to the means that the person  
15 uses to take the property from another, whereas larceny is  
16 addressed to the ends that the person intends when he has  
17 taken the property, and they are two different offenses.

18 Robbery is an offense against the person, and  
19 larceny is an offense involving property.

20 QUESTION: Are there cases involving the Hobbs  
21 Act -- there's none in this Court -- in which we've said  
22 that the intent to steal does not -- is not included, but  
23 are there cases in the courts of appeals?

24 MR. FREDERICK: There are cases in the courts of  
25 appeals that hold that the Hobbs Act does not require an



1 additional mental element of intent to steal or other --  
2 any other special intent requirement, as Congress drafted  
3 in three different provisions of the bank robbery statute.

4 The knowing, knowing that the stolen property,  
5 the receiver of stolen property has to know that it is  
6 stolen in 2113(c), in 2113(b) the intent to steal, and in  
7 second paragraph, 2113(a), the bank burglary offense  
8 Congress drafted that the person entering the bank has to  
9 do so with intent to commit a felony.

10 So it is clear that there are specific textual  
11 indicators of this statute that underscore that Congress  
12 knew how to include a special mental element but did not  
13 do so in the bank robbery offense.

14 QUESTION: Let me ask you, Mr. Frederick, about  
15 the common law defense to the crime of robbery, and as I  
16 understand it, or your opposite counsel, that it was a  
17 defense if the defendant thought it was his own property.

18 MR. FREDERICK: That's correct. The --

19 QUESTION: But I suppose no reasonable defendant  
20 could think that a bunch of dollar bills in a drawer in a  
21 bank were his own property. He might think that he had  
22 maybe 10 days earlier deposited another bunch of dollar  
23 bills, but certainly he wouldn't think that the particular  
24 dollar bills that he cashier gave him under the threat of  
25 a gun were his own property.

1 MR. FREDERICK: I think that's reasonable,  
2 Mr. Chief Justice.

3 QUESTION: Well, that may be, but then why does  
4 that appear in (b)?

5 MR. FREDERICK: It appears --

6 QUESTION: Which also applies only to money in  
7 the possession of any bank, credit union, or any savings  
8 and loan association, and it specifically requires an  
9 intent to steal or purloin.

10 MR. FREDERICK: Traditionally a person could  
11 take money. A person who goes into a bank has -- you  
12 know, fills out the deposit slip or the withdrawal slip in  
13 a certain way and takes out \$1,000, intending only to make  
14 a withdrawal of \$100, and the teller says, hey, wait a  
15 minute, you've just walked out of the bank, you have taken  
16 \$1,000 from the care, custody, or control of the bank.

17 That is not larceny unless the person had the  
18 intent to steal the money. An innocent taking would not  
19 be criminalized in the same way that a person who went  
20 into the bank with a gun and said to the teller, give me  
21 \$1,000, would be regardless of what the robber ultimately  
22 intended to do with the funds.

23 Our position is that that dangerous activity by  
24 a robber fundamentally makes robbery a different offense  
25 from larceny.

1 QUESTION: Can I ask a question about the  
2 \$1,000, because you've only -- you've devoted about three  
3 or four sentences in your brief, but it is different, and  
4 the jury does have to find, I take it, the 1,000, is that  
5 right?

6 MR. FREDERICK: Yes.

7 QUESTION: All right. But if we say -- I don't  
8 know how to deal with that. That is, it would seem to me  
9 that if that's what makes the difference, then in  
10 instances where Congress could really want a lesser-  
11 included offense -- say, (b) is lesser-included of (a),  
12 let's say.

13 And then it takes (b) and it divides it into two  
14 or three parts, one part being a misdemeanor, another part  
15 being a felony, another part being a more serious felony,  
16 it would turn out even though Congress wanted it to be a  
17 less -- a lesser-included offense, you never could get the  
18 charge, because you'd have to pick (a) or (b) or (c).

19 You see, you'd have to pick version 1, version  
20 2, or version 3, since one or the other would fit your  
21 case, and then the fact that there were these two other  
22 versions would prevent you from getting the charge, so I  
23 can't work it out.

24 MR. FREDERICK: Justice Breyer, we would concede  
25 that a case arising, a question under second paragraph (b)

1 is a much more difficult one than under first paragraph  
2 (b), but let me emphasize, and I'm looking at 2a of the  
3 appendix to our brief where the language is set forth, the  
4 with -- not exceeding \$1,000 is right between two elements  
5 of the offense.

6 QUESTION: You're talking about the first  
7 paragraph of (b)?

8 MR. FREDERICK: Yes.

9 QUESTION: Or the second paragraph?

10 MR. FREDERICK: The first paragraph of (b). The  
11 value exceeding \$1,000 occurs between two elements of the  
12 offense. It occurs to us as an untenable argument to make  
13 that exceeding \$1,000 is not an element of the offense.

14 And furthermore, there would be a grand jury  
15 clause problem if we were not to charge it in the  
16 indictment.

17 QUESTION: That's true, but what worries me is,  
18 imagine the other two elements are out of the case.  
19 Suppose Congress wrote (b) -- you know, both parts of it,  
20 both parts of the bank larceny statute in identical words  
21 to (a), so robbery, absolutely identical but for the force  
22 or violence.

23 And now what it does is, instead of having one  
24 provision saying that, it has two provisions saying it,  
25 distinguished only by the \$1,000. All that Congress

1 wanted to do there is make it a felony or make it a  
2 misdemeanor, but the felon couldn't get -- you see, then  
3 no one could get the lesser-included charge simply because  
4 of that fact.

5 That can't be right, but I don't know why it  
6 isn't right.

7 MR. FREDERICK: I would concede it is a much  
8 more difficult question, but let me point out that in  
9 either circumstance Congress was talking about property  
10 that was subject to monetization. It had to be property  
11 with a monetary value.

12 There are circumstances in which a robber could  
13 ask for property that could not be given a monetary value  
14 such as, give me the blank checks that are in your till.  
15 Give me the account information of all of the people who  
16 have more than \$1 million in this bank. Give me the  
17 computer access codes so that I can go home and I can get  
18 into the bank.

19 You know, that kind of information is very  
20 valuable to a robber, but would not necessarily be subject  
21 to the monetization requirement, and the prosecution in  
22 that kind of bank robbery would not have to prove beyond a  
23 reasonable doubt that there was some monetary value, and  
24 the jury would not have to find it.

25 We would simply have to establish that the



1 robber had used force within the person or presence of  
2 another to get anything of value, and I think we would be  
3 able to satisfy the requisites of the offense in a  
4 prosecution of that type.

5 QUESTION: Yes, but when you do that, what you  
6 have done is to prove the misdemeanor variety. You have  
7 proved that there is some value, but you have not proved  
8 that the value is over \$1,000, so you've got a simple  
9 lesser-included in that case.

10 MR. FREDERICK: Well, it depends on --

11 QUESTION: Isn't it -- I'm --

12 MR. FREDERICK: Justice Souter, that is a very  
13 difficult question, because the wording of second  
14 paragraph (b) is not exceeding \$1,000, so you know, the  
15 question is, what does that mean? Our position is that  
16 the offenses --

17 QUESTION: Well, it means -- since you have the  
18 burden of proof, it means anything that you have proven --  
19 anything that you have not proven to have a value  
20 exceeding a 1,000.

21 MR. FREDERICK: We construe the provision to be  
22 property that is subject to some kind of monetary  
23 valuation.

24 QUESTION: Why isn't the better answer to the  
25 problem -- I mean, we all have it. Justice Breyer

1 articulated it, but I mean, this strikes us all as odd.

2 But why isn't the answer to it, Congress could  
3 put in a sentence and say that in an indictment that  
4 charges property of value exceeding \$1,000 -- I'm sorry,  
5 that in an indictment for robbery that does not specify  
6 value, that depending on -- that either of the  
7 subparagraphs may be treated as a lesser-included offense?

8 MR. FREDERICK: It could certainly have done  
9 that, Justice Souter.

10 QUESTION: You know, depending on the value  
11 that's actually proven at trial.

12 MR. FREDERICK: Absolutely, and I would like to  
13 make one other point about this statute in that regard,  
14 that in the subsections (d) and (e) Congress did use very  
15 similar language to make clear that (a) and (b) were  
16 lesser-included offenses of aggravated robbery where the  
17 person had been assaulted or there had been a death  
18 ensuing.

19 And the way Congress worded that made it clear  
20 from the very first provision of the bank robbery statute  
21 in 1934 there was a lesser-included offense for simple  
22 bank robbery versus aggravated bank robbery.

23 QUESTION: In effect a special rule to get  
24 around Schmuck in cases like this.

25 MR. FREDERICK: No. The point is that Congress

1 did not intend to make bank larceny a lesser-included  
2 offense of bank robbery, and we know that from the various  
3 textual indications in the statute.

4 QUESTION: No, but if it wants to there's a  
5 simple way to do it.

6 MR. FREDERICK: Well, no, because --

7 QUESTION: Without getting into a Schmuck  
8 elements problem. That's all I'm saying.

9 MR. FREDERICK: I don't think Congress could get  
10 around that, Justice Souter --

11 QUESTION: Why?

12 MR. FREDERICK: -- because the prosecution would  
13 still have to prove all of the elements. It would simply  
14 have to prove the additional element.

15 QUESTION: You mean, you can't make it a lesser-  
16 included unless it is a lesser-included.

17 MR. FREDERICK: That's right.

18 QUESTION: You can only make it a lesser-  
19 included by defining the elements in such a way that it  
20 is.

21 MR. FREDERICK: Yes, or saying we incorporate  
22 this subsection in all of the elements.

23 QUESTION: Why is that so?

24 MR. FREDERICK: Because the elements --

25 QUESTION: Why can't Congress say, we're going

1 to treat this as if it were a lesser-included, depending  
2 on the proof that is adduced at trial? Why can't Congress  
3 do that?

4 MR. FREDERICK: Well, I think Congress can do  
5 that, but the way it would have to do that would be by  
6 reference to the prior offense, or the greater offense,  
7 and taking out a subset that would not have to be proved.

8 QUESTION: Well, if that --

9 QUESTION: Mr. Frederick, you've said that (a)  
10 is not a statute that uses common law terms, that there  
11 are a lot of things in the first paragraph of (a) which  
12 are not common law robbery terms. What in particular, by  
13 force and violence? Isn't that the standard requirement?

14 MR. FREDERICK: At common law the phrase was,  
15 force or putting in fear. It's broader in this by  
16 including force and violence or by intimidation, which is  
17 not -- is close to putting in fear, but we would submit  
18 not of the same degree of magnitude in terms of force,  
19 that there is no intent to --

20 QUESTION: Gee, I don't think that's very much  
21 difference. Do you think they meant something different  
22 by saying by force and violence, or by intimidation they  
23 meant something different than by --

24 MR. FREDERICK: I think they meant for --

25 QUESTION: -- force or putting in fear?

1 MR. FREDERICK: I think they meant for it to be  
2 easier to establish. Here, in this case, for instance, it  
3 was an intimidation theory, where the defendant in this  
4 case went to the teller, in one case used a sign saying,  
5 hold-up, and frightened the teller. It --

6 QUESTION: Now, that is to say, put the teller  
7 in fear. I think you intimidate somebody if you put them  
8 in fear. I don't --

9 MR. FREDERICK: Well, let me move to another one

10 QUESTION: Yes, try --

11 MR. FREDERICK: -- that may be more persuasive  
12 to you.

13 QUESTION: What else is there? I mean, I  
14 understand the later portion, or obtains, or attempts to  
15 obtain by extortion. Well, that's fine, but that's a  
16 different section of it. That's not the robbery section,  
17 I wouldn't say.

18 MR. FREDERICK: That's correct. Let's start  
19 with property. At common law it had to be personal,  
20 tangible property that was taken. Under this statute,  
21 there is no such limitation. It's any property or money  
22 or any other thing of value.

23 QUESTION: Uh-huh.

24 MR. FREDERICK: At common law, it had to be  
25 property of another. Under this statute, it is belonging



1 to or in the care, custody, control, management, or  
2 possession of any bank, credit union, or savings and loan  
3 institution. It's a broader --

4 QUESTION: Even, presumably, if it's your own  
5 money, yes.

6 MR. FREDERICK: That's correct. Robbery of your  
7 own money would still be robbery under this statute.

8 As we've pointed out, there's no carrying away  
9 requirement, and there is no intent to deprive permanently  
10 of property, so --

11 QUESTION: Yes, but they could have been left  
12 out, because you acknowledge that sometimes in the Federal  
13 context, even in the State context, some of the elements,  
14 when a crime is defined, are left out, but without the  
15 intention of not requiring them.

16 MR. FREDERICK: Justice Scalia, I would not want  
17 to concede that for purposes of this argument we would be  
18 taking --

19 QUESTION: Okay.

20 MR. FREDERICK: -- the view that criminal  
21 offenses should be construed by courts to have common law  
22 concepts reinserted without some very clear indication  
23 that Congress intended to do that.

24 QUESTION: Fair enough.

25 QUESTION: In other words, if you know that the

1 bank robber -- sorry, the bank robber knows that the money  
2 on the counter belongs to him, the bank robber.

3 In fact, he's not a bank robber. He's just an  
4 irate customer, and he gets so angry at the delay that  
5 that money that he knows is his, he threatens to punch the  
6 teller in the nose. I guess that could happen. The  
7 teller's taking a long time.

8 In your view, Congress intended to punish that  
9 as bank robbery?

10 MR. FREDERICK: Yes.

11 QUESTION: Yes. Is there any indication  
12 anywhere that Congress wanted to punish that as bank  
13 robbery?

14 MR. FREDERICK: No, except for the words of the  
15 statute, which suggest that Congress wanted to deal with  
16 people who forcefully took property from the person or  
17 presence of another in a way that would be deemed in, I  
18 think, unsocial behavior, and that is the essence of our  
19 theory that robbery is fundamentally different because of  
20 the means the person uses to take the property.

21 QUESTION: But let me ask you, I'm still -- I'm  
22 still not totally -- I -- and you might be helpful on  
23 this. If -- remember, I'm imagining that all your  
24 arguments are out of this case.

25 It is written identically, the larceny, to the

1 robbery ones, and none of your arguments are there but for  
2 the force or violence, but for the \$1,000.

3 I'm still -- and you agree, I take it, or don't  
4 you, that if Congress had wanted, in (a) it has bank  
5 robbery, in (b) and (c) it has bank larceny, identically  
6 worded but for force in (a) and but for \$1,000 in (b) and  
7 nothing in (c).

8 All right. Now, do you think Congress could  
9 have said, and by the way, being a little informal, we  
10 want (b) and (c) to be lesser-included offenses of (a)?  
11 It could have said that.

12 MR. FREDERICK: Yes.

13 QUESTION: And if it had said that, they'd be  
14 entitled to the charge.

15 MR. FREDERICK: Yes. I think that --

16 QUESTION: All right. Then my question is,  
17 given a Federal Criminal Code with 4,000 sections, or  
18 3,800, having been written at different periods with  
19 different drafting styles, with different understandings  
20 of law, don't we have to try to figure out whether  
21 Congress implicitly wanted to do that, rather than looking  
22 for some actual form of words in (a) that would tell us?

23 MR. FREDERICK: Yes. I do think that the Court  
24 has to do what it can to infer congressional intent, and  
25 the position that you've articulated is by far the most

1       difficult --

2               QUESTION:  Yes.

3               MR. FREDERICK:  -- hypothetical under this  
4       statute.

5               QUESTION:  Do you think that Congress gives a  
6       lot of intent in drafting statutes as to whether one is a  
7       lesser-included offense than the other?

8               MR. FREDERICK:  Well, in some instances it is  
9       clear that Congress has intended to do that.  In other  
10      instances, it is less clear.

11              QUESTION:  You say this is not one of them.

12              MR. FREDERICK:  Well, this is one where Congress  
13      did, we submit, think about the overall concept of lesser-  
14      included offenses, because it made aggravated robbery a  
15      greater offense of simple robbery.

16              QUESTION:  Really?  Do you really think that a  
17      majority of the Members of Congress even knew that the  
18      word feloniously had been dropped from this provision,  
19      much less had a particular intent as to what the dropping  
20      of it meant?  Do you really think that?

21              MR. FREDERICK:  What we know is that the act  
22      that they all voted on did not have the word feloniously  
23      in it, and --

24              QUESTION:  It seems to me -- I have one question  
25      under (c) again.  Under your view, if there's been a

1 robbery under (a), then there can be no receiving stolen  
2 property under (c) without your going ahead and showing  
3 that the elements of larceny were really there anyway.  
4 That seems to me a little odd.

5 MR. FREDERICK: The omission --

6 QUESTION: I mean, you're going to have  
7 robberies under (a) that you prosecute under (a), but then  
8 you have people who receive stolen property and you're  
9 going to have to show there's a (b) offense. That seems  
10 to me a strange way to operate.

11 MR. FREDERICK: It is, and the Court dealt with  
12 that in Gaddis by saying that it functionally was to be  
13 construed that the person -- if the property had been  
14 stolen through a robbery, that intent requirement is what  
15 had to be established there even though the word a)  
16 doesn't appear in the subsection (c) --

17 QUESTION: And to that extent it seems to me,  
18 even given Gaddis, that the (c) problem helps the  
19 petitioner more than you.

20 MR. FREDERICK: Well, as to who it helps more,  
21 it's six of one, half-dozen of the other, because (c) also  
22 includes a special mental element indicating that Congress  
23 knew how to put special mental elements in these  
24 provisions when it wanted to, and it did not do that for  
25 the robbery provision.



1           So -- Gaddis also says that (c) is not a lesser  
2 offense of (a) and (b), that it is a distinct offense  
3 because of the different elements that were required to be  
4 proved for that.

5           Now, I would like to make one final point before  
6 closing, and that is that a number of courts of appeals,  
7 in addressing the question of intent under this statute,  
8 have faced claims by defendants that they lacked the  
9 requisite intent to commit bank robbery either because  
10 they were involuntarily intoxicated or they were on LSD,  
11 or they had psychic problems, or some other nature that  
12 would negate the specific intent that they thought had to  
13 be proved under the provision.

14           An argument that robbery has such a special mens  
15 rea raises the specter that defendants will attempt to  
16 negate that element of intent.

17           QUESTION: May I ask you one historical  
18 question? You mentioned some elements of this offense  
19 that differ from common law robbery such as the care,  
20 custody, and control of the bank and so forth. Were those  
21 elements in the statute before 1948?

22           MR. FREDERICK: Yes.

23           QUESTION: So if -- so they don't show that the  
24 '48 revision made a change. They are not evidence of the  
25 '48 codification changing the meaning of the statute.

1                   MR. FREDERICK: That's correct. The 1934 act  
2 was whoever by force and violence, or by putting in fear,  
3 feloniously takes, or feloniously attempts to take from  
4 the person or presence of another any property or money or  
5 any other thing of value belonging to or in the care,  
6 custody, control, management, or possession of any bank,  
7 and the subse -- I mean, that core language has basically  
8 stayed with the provision from 1934 to the present day.

9                   If there are no further questions, we would  
10 submit that the decision should be affirmed.

11                  CHIEF JUSTICE REHNQUIST: Thank you,  
12 Mr. Frederick.

13                  The case is submitted.

14                  (Whereupon, at 12:05 p.m., the case in the  
15 above-entitled matter was submitted.)  
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